

MacDonald v Beth Israel Med. Ctr.

2014 NY Slip Op 33677(U)

September 11, 2014

Supreme Court, New York County

Docket Number: 800048/11

Judge: Douglas E. McKeon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DOUGLAS E. McKEON
J.S.C.
Justice

PART 38

EA
9/11/14
E

Kathleen MacDonald

INDEX NO. 8 05048/11

- v -

MOTION DATE _____

MOTION SEQ. NO. (001)

Beth Israel Medical Center et al.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion and cross-motion are decided as per the annexed Memorandum Decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
SEP 12 2014
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
SEP 11 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 9/11/14

Douglas E. McKeon
HON. DOUGLAS E. McKEON
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

KATHLEEN MacDONALD,

Plaintiff,

-against-

MEMORANDUM DECISION

Index No. 800048/11

BETH ISRAEL MEDICAL CENTER, JASON
M. BRATCHER, M.D. and SHAMIT PATEL, M.D.,

FILED

Defendants.

SEP 12 2014

HON. DOUGLAS E. MCKEON:

**NEW YORK
COUNTY CLERK'S OFFICE**

Motion, by defendants Beth Israel Medical Center ("BIMC") and Shamit Patel, M.D., for an order pursuant to CPLR 3211 and 3212 granting summary judgment and dismissing the complaint in its entirety is denied. Cross-motion, by defendant Jason M. Bratcher, M.D., pursuant to CPLR 3212 for an order granting partial summary judgment and dismissing all claims asserted against Dr. Bratcher in regard to his post-ERCP care of plaintiff is also denied.

Plaintiff alleges that defendants were negligent in the care they rendered to her before, during, and after an Endoscopic Retrograde Cholangiopancreatography ("ERCP") procedure performed at BIMC by plaintiff's private physician Dr. Bratcher. Plaintiff asserts that BIMC is vicariously liable for the care rendered by its staff physician, Dr. Patel. Specifically, plaintiff claims that defendants improperly performed surgery, negligently caused a perforation, caused pancreatitis, failed to properly diagnose and treat sepsis, failed to warn plaintiff of the risks involved in the ERCP procedure, failed to properly monitor the plaintiff post-ERCP, and improperly discharged the plaintiff.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence

of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 (1985). Once the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action. *See Zuckerman v. City of New York*, 49 NY2d at 562. When considering a motion for summary judgment, the court must view the evidence in the light most favorable to the party opposing the motion. *See Makaj v. Metropolitan Transport Authority*, 18 AD3d 625, 626 (2d Dep't 2005).

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not a proximate cause of the injuries alleged. *See Roques v. Nobel*, 73 AD3d 204, 206 (1st Dep't 2010). To satisfy the burden, a defendant must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. *Id.* If the movant makes a prima facie showing, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact. *Id.*

In their motion for summary judgment, defendants BIMC and Dr. Patel argue that they are shielded from liability on the ground that all decisions about plaintiff's gastrointestinal ("GI") care, including all post-ERCP issues resulting from the surgery such as possible perforation and pancreatitis, and plaintiff's discharge from BIMC, were made by plaintiff's private physician Dr. Bratcher and that the BIMC staff, including Dr. Patel, followed the directions of Dr. Bratcher and exercised no independent medical judgment with regard to the plaintiff's GI care. Their position is

supported by expert Dr. Fein, board certified in internal medicine and critical care medicine.

Initially, this Court notes that it is undisputed that BIMC and Dr. Patel are not responsible for any errors or omissions occurring before or during the surgery in question. Thus, plaintiff's opposition is limited to the post-surgical care rendered to plaintiff at BIMC and the allegations in plaintiff's complaint regarding the performance of the ERCP procedure and matters that arose before it are dismissed as they relate to BIMC and Dr. Patel.

Dr. Bratcher argues that he properly and appropriately treated the plaintiff while she was admitted to BIMC. His opinion is supported by Dr. Dillon, who is board certified in radiology. He opined that the CT scan taken post-ERCP was consistent with pancreatitis and that the scan showed no evidence of an abscess. He relies on Dr. Fein's expert opinion that the plaintiff was properly treated following the ERCP procedure and that she was properly discharged.

Plaintiff argues that Dr. Bratcher failed to meet the standard of care in his post-ERCP treatment of the plaintiff. His opposition papers are supported by Dr. Sabido's expert affirmation. Dr. Sabido was also a treating physician. Plaintiff sets forth that Dr. Patel and Dr. Bratcher were attendings for plaintiff during the post-ERCP period, and therefore, there is a question of fact as to which physician managed plaintiff's care improperly.

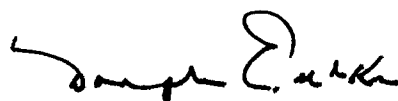
This Court determines that the plaintiff has demonstrated that material issues of fact exist, such that defendants' motion and cross-motion for summary judgment are denied. This is not a situation where there was no after care provided by BIMC physicians and staff. Based on the submissions before this Court, though the BIMC physicians and staff may have generally deferred decision-making to the private attending Dr. Bratcher it cannot be said that BIMC and Dr. Patel are entitled to summary judgment as a matter of law. Plaintiff has demonstrated that material issues of fact exist regarding whether (1) plaintiff was discharged prematurely after undergoing an ERCP

procedure and therefore (2) whether BIMC and its physicians had involvement or should have been involved in that decision. This court holds that it is for the trier of fact to determine whether the defendants departed from the accepted standards and whether those departures were a proximate cause of the plaintiff's claimed injuries.

Accordingly, defendants' motion and cross-motion are denied.

This constitutes the Decision and Order of the Court.

Date: September 11, 2014
New York, New York



Douglas E. McKeon, J.S.C.

FILED
SEP 12 2014
NEW YORK
COUNTY CLERK'S OFFICE